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(95)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक Cr.A.No-2470/2000 सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

SB: HON'BLE SHRI DHIRENDRA MISHRA, J.

APPELLANTS (IN JAIL)

1. Prithvipal @ Robet S/o Heera Tirki, aged about 19 years.
2. Jeevan @ Botalo Majhi S/o Ramsai Majhi, both R/o village – Jahlipara, Mudapara, P.S. Patthalgaon, Distt. Raigarh (M.P.)

VERSUS

RESPONDENT State of Madhya Pradesh

15-11-2007

Shri Abhay Tiwari, Advocate, for the appellants.

Shri Neeraj Mehta, Panel Lawyer for the State.

2. This criminal appeal is directed against the judgment of conviction and order of sentence dated 15th September, 2000 passed in S.T. No. 102/98 whereby the learned 1st Additional Sessions Judge, Raigarh has convicted the appellants under Section 376(2)(g) of the Indian Penal Code and sentenced them to undergo R.I. for 10 years.

3. The case of the prosecution in brief is that on 4-5-98, father of the prosecutrix namely Sukul (P.W. 7) lodged written report of Ex. P-11 mentioning therein that his daughter prosecutrix (P.W. 8) is studying in Class 6. She is dumb and she speaks very less. As per school certificate, her date of birth is 1-2-1984. Five to six months before, accused persons forcibly raped her and asked the prosecutrix not to disclose this fact or else they shall kill her. The prosecutrix

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 2	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

narrated about the incident to her parents a week before. A meeting was convened in the village on 3-1-1998, however the accused persons have denied the incident. On the basis of the above report, crime was registered. During investigation, the prosecutrix was sent for medical examination to Civil Hospital, Dharmjaigarh where Dr. (Smt.) Bindu Singhal (P.W. 13) examined her and gave report of Ex. P-16. The prosecutrix was also sent for radiological examination and the report of the Radiologist Ex. P-12 has been proved by Dr. Joshi. The mark sheet of Ex. P-10 of the prosecutrix was taken into possession vide seizure memo of Ex. P-9. After completing investigation, charge sheet was filed in the Court of Judicial Magistrate First Class, Dharmjaigarh and the same was received on transfer for trial by learned Addition Sessions Judge.

4. During trial, the prosecution examined 14 witnesses in all and thereafter statements of the accused persons were recorded in which they denied the evidence appearing against them in the prosecution case and pleaded innocence and false implication at the instance of some Jagmohan. The trial Court after hearing the learned counsel for the parties, has convicted and sentenced the appellants as mentioned above.

5. The conviction of the appellants is based on the statements of the prosecutrix (P.W. 8), her father Sukul (P.W. 7), her brother Christopher (P.W. 9) and her mother Philomina (P.W. 10). Other

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 3	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

prosecution witnesses examined namely Chandan Sai (P.W. 1), Akalu (P.W. 2), Piyarsai (P.W. 3), Bora (P.W.4) and Kamalsai (P.W. 5) have not supported the case of the prosecution and they have turned hostile. The trial Court has not recorded any finding with respect to the age of the prosecutrix and it has been observed that the age of the prosecutrix is irrelevant as the prosecutrix was subjected to gang rape by the accused persons without her consent.

6. Learned counsel for the appellant submits that from the evidence available on record, it is evident that the prosecutrix was more than 16 years of age on the date of incident. Entry in the mark sheet regarding the age of the prosecutrix is belied by the father of the prosecutrix who has stated that in the hospital record, the date of birth of the prosecutrix is 12-8-81. The Radiologist after conducting ossification test has assessed the age of the prosecutrix between 17 to 19 years and therefore, the prosecution has failed to prove that the prosecutrix was minor at the time of incident. It was further agued that conviction is based on the statement of the prosecutrix however, from perusal of the statement of this witness, it would be evident that she was not conversant with the Hindi language and therefore, for recording her statement, service of her father Sukul was taken for interpreting the statement of the prosecutrix. It is argued that the father himself had lodged the F.I.R. of Ex. P-11 and as such, he was *de facto* complainant and whole statement of the prosecutrix has been recorded as stated by her father and therefore, the Court below

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आदेश पत्रक (पूर्वानुबद्ध)

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

was not justified in placing reliance over the version of the prosecutrix and benefit of doubt ought to have been extended to the appellants. Referring to the M.L.C. report of Ex. P-16, it was argued that the prosecutrix was carrying 28 weeks' pregnancy at the time of examination on 4-5-1998 and the incident was disclosed by the prosecutrix for the first time in the month of May, 1998 and for this whole period, she did not disclose the commission of offence to any other persons. The explanation of the witnesses in this regard that under the threat of the accused persons, the same was not disclosed appears to be improbable and the conduct of the prosecutrix in lodging the report belatedly creates reasonable suspicion that she is not a witness of truth.

7. On the other hand, learned counsel for the State supporting the impugned judgment argued that the prosecutrix of a tender age was subjected to gang rape by the appellants, she was barely able to speak and her statement has been recorded on the basis of her gestures and signs. She has categorically stated that the accused persons threatened her not to disclose this fact and because of the act of the appellants, she gave birth to a male child. Her version is duly corroborated from the statements of her brother P.W. 9 Christopher, father P.W. 7 Sukhu and mother (P.W. 10) Philomina.

8. I have heard learned counsel for the appellants. I have also perused the record including the impugned judgment.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 5	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

9. So far as the age of the prosecutrix is concerned, the prosecution has relied upon the mark sheet of Ex. P-10 which mentions the date of birth of the prosecutrix to be 1-2-1984, however from perusal of the statement of her father Sukul who has stated in para 3 of his deposition that as per the hospital record, her date of birth is 12-8-1981. The Radiologist has also assessed the age of the prosecutrix between 17 to 19 years and, therefore, the prosecution has failed to prove the correct age of the prosecutrix beyond reasonable doubt.

10. Now coming to the question of commission of gang rape by the appellants. To establish the above fact, the prosecutrix has been examined as P.W. 8. Before recording her statement the trial Court has observed that she is not able to speak properly as she is hard of hearing and, therefore, her mother Philomina was summoned for putting questions to her through signs in Uraon language on 8-6-1999. She was re-examined after administering oath on 1-10-99. On that date also initially the Court observed that the witness is not able to speak and she answers the questions by gestures and it has been further observed that no independent person knowing Uraon language is available and for this purpose, the matter was adjourned thrice and, therefore, the father of the prosecutrix Sukul was engaged as interpreter rejecting the objection of the defence. Thereafter her statement has been recorded from para 3 of her deposition. She has stated that she identifies the accused persons. They are resident of

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 6	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

her village. At the time of incident, she was studying in Class 6. Accused persons used to take her and on her refusal they used to beat her by lathi. They also used to threaten her not to disclose this fact to her father or else they shall kill her. The accused persons have spoiled her life and robbed her honour as a result of which she became pregnant and gave birth to a son. Her honour was robbed under a mango tree on 6-7 occasions. On being asked who is Robate, she pointed out towards Robate alias Prathvipal and stated that his name is Robate. She further stated that accused Robate took her to his house and robbed her honour and threatened not to disclose the incident and at that time, the other accused was also present and both of them robbed her honour. She has denied the suggestion that she had relationship with Putu and Kudo of their village. She has admitted that they resided in her village, she has further admitted that she had disclosed the incident for the first time on the date of lodging the report. She has also stated that she has stated the fact that the accused persons used to assault her by lathi and used to threaten her not to disclose this fact to father or else they shall kill her and throw, however if this fact is not written in her diary statement of Ex. D-4, then she cannot give the reasons for the same. Omission regarding repeating the offence on six occasions has also been pointed out in her cross-examination. She has further admitted that the house of Robate is located in the middle of the village and is surrounded by the house of other villagers, however she did not

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disclose the fact to any villager. She has denied that the child was through Puto and Kudo.

11. P.W. 7 Sukul the complainant has also stated that her daughter is hard of hearing and she talks little. She became pregnant on account of wrong deed of the accused persons and they have spoiled her life. After they learnt about the pregnancy, they asked her daughter and she named the accused persons as perpetrator of the offence.

12. Similar is the statement of brother of the prosecutrix P.W. 9 who has also stated that a meeting was convened in the village and in the said meeting her sister had pointed towards the accused persons and stated that they had robbed her honour. Statement of mother of the prosecutrix P.W. 10 Philomina is also in the similar line.

13. If the evidence adduced by these witnesses particularly the evidence of the prosecutrix is examined, it would be evident that her statement was recorded by the trial Court on the basis of interpretation of her signs and gestures by her father Sukul. It is also not in dispute that the written report of Ex. P-11 was lodged by this witness. The evidence is also not in question answer form. Signs of the witness have also not been recorded and only interpretation by the father has been recorded as if the evidence has been recorded on the basis of oral evidence given by the prosecutrix. There is evidence available on record that the prosecutrix was studying in Class 6 or

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 3	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

Class 7, however the trial Court did not make any effort to record the statement of the prosecutrix in written form and in these circumstances, implicit reliance could not be placed on the statement of the prosecutrix.

14. So far as the statement of other witnesses is concerned, they are mother, father and brother of the prosecutrix and they have deposed before the Court on the basis of the information given to them by the prosecutrix.

15. On the basis of the aforesaid analysis, this Court is of the opinion that the Court below was not justified in convicting the appellants by placing implicit reliance on the statement of the prosecutrix and the trial Court ought to have extended benefit of doubt to the accused persons.

16. In the result, the instant appeal succeeds. The impugned judgment of conviction and order of sentence convicting the appellants under Section 376(2)(g) of I.P.C. and sentencing them to undergo R.I. for 10 years are set aside. The appellants are acquitted of all the charges. The appellant No. 1 is stated to be on bail. His bail bond is discharged. The appellant no. 2 is stated to be in jail. He be set at liberty forthwith if no required in any other case.

Sd/-
DHIRENDRA MISHRA
Judge

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